No. 80-758

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE SS ZOE COLOCOTRONI, MARBONANZA COMPANIA NAVIERA, S.A., COLOCOTRONI LTD., COLOCOTRONI BROTHERS, S.A., THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG) AND THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED,

PETITIONERS,

v.

THE COMMONWEALTH OF PUERTO RICO AND THE ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. *Summary of Pertinent Facts*

1. *The Grounding and Subsequent Oil Spill*

On March 15, 1973, the SS ZOE COLOCOTRONI departed La Salina, Venezuela, with a full load of crude oil

for Guayanilla, Puerto Rico. At 0110 hours on March 18, eighteen or twenty miles due south of Puerto Rico the ship's master was not able to establish her position. At 0300 hours on March 18 the ZOE COLOCOTRONI ran out of water and went hard aground 3 miles due south of Puerto Rico. About 10 minutes after the grounding the ZOE COLOCOTRONI dumped 5,170.1 tons or 1.5 million gallons of oil into the sea. This oil, displaced by the elements, came ashore at Bahia Sucia, a natural shoreline mangrove forest in the southwestern tip of Puerto Rico. The oil devastated the entire Bay. The cause of the grounding was the fact that the ship's crew was hopelessly lost while making the approach to Puerto Rico. The factors which directly contributed to this condition were (1) lack of proper charts and nautical publications onboard, (2) the failure of the master to properly compensate for a westerly set in the current, (3) inoperative or defective navigational equipment among which were: (a) the gyro compass, (b) the gyro compass recorder, (c) the fathometer, (d) the fathometer recording device, (e) the radio direction finder, (f) the radar and (g) the radio equipment; (4) an incompetent crew (the third officer, the radio operator and two engineers were unlicensed) and (5) the failure to post a bow lookout. The ZOE COLOCOTRONI was a rust bucket. (58a-67a)[1]

2. *The Parties*

As a result of the spill the Commonwealth of Puerto Rico and its principal environmental agency, the Environmental Quality Board (hereinafter referred to as "E.Q.B.") on March 19, 1973, filed an admiralty suit *in rem* and *in personam* against the SS ZOE COLOCOTRONI and her owners, Marbonanza Compania Naviera, S.A. and/or Colocotroni Ltd.,

[1] Page references to defendants-petitioners' Appendix, which is bound separately are cited " a". Page references to the 10-Volume Appendix used before the Court of Appeals are cited "A ", and the 3-Volume Consolidated Supplemental Appendix as "SA ".

and/or Colocotroni Brothers, S.A. and the underwriters, The West of England Ship Owners Mutual Protection and Indemnity Association (Luxembourg) and The West of England Ship Owners Mutual Insurance Association (London) Limited (hereinafter referred to as "West of England"). (58a)

B. *The Proceedings Below*

1. *Proceedings in the District Court*

Plaintiffs claimed clean up costs and damages to the natural resources of Bahia Sucia. Admiralty and maritime jurisdiction of the District Court was invoked pursuant to 28 U.S.C.A. 1333. (7a)

West of England moved to quash the service of process made pursuant to the Puerto Rico Long Arm Statute and to dismiss the action. This motion was denied by the District Court in its opinion and order of January 14, 1977. (109a)

On October 21, 1977, the District Court struck defendants' pleadings on the issue of liability and their petition for exoneration from and/or limitation of liability. The District Court left open the question of damages. (103a, 58a)

The District Court found that defendants had exhibited "bad faith and callous disregard of their responsibilities in this litigation", characterized defendants' conduct as "an affront to this court's dignity" and found that the conduct had severely prejudiced plaintiffs' preparation of their case as well as the court's attempts to assure that the trial proceeded as scheduled. (107a) The facts upon which those findings were based appeared fully stated by the Court of Appeals' Opinion of August 12, 1980. (16a-24a)

The trial on the question of damages commenced on November 7, 1977 and lasted six weeks.

On August 15, 1978, the District Court ruled that the Commonwealth of Puerto Rico had standing to sue by reason of its

proprietary interest in the affected property and pursuant to the common law doctrines of "trustees of the public trust" and "parens patriae". The Court also held that the Environmental Quality Board had a cause of action arising under Section 1131(29) of the Puerto Rico Public Policy Environmental Act, 12 L.P.R.A. 1131(29). (67a-70a) The District Court found that 5 years after the spill there was still 23 acres on the west side of Bahia Sucia containing oil impregnated sediments. (84a-86a). The Court further found that over 92 million marine animals were destroyed as a result of the oil spill. (85a) Based on the uncontradicted evidence in the record, the Court concluded that said animals could not be replaced at a cost of less than six cents per animal. The District Court rejected part of plaintiffs' restoration proposal of restoring the area by removing the oil impregnated sediments and replacing said sediments with new material, but did grant plaintiffs the cost of replanting 23 acres of mangrove and the cost of monitoring the plantation for five years. Thus, the court entered judgment in favor of the plaintiffs in the amount of $78,108.89 for plaintiffs' proven and unreimbursed clean up costs; $559,500 for replanting 23 acres of mangrove and monitoring them for five years; and $5,526,583.20 for the replacement cost of the marine animals that were destroyed by the oil spill. (85a-86a)

After filing a timely appeal, defendants asked the Court of Appeals for permission to file in the District Court motions under Rule 60(a) and 60(b) of the Federal Rules of Civil Procedure for the correction of alleged clerical mistakes and for relief from judgment. The Court of Appeals, on June 11, 1979, held that leave was not required prior to filing a Motion for Relief in the District Court under Rule 60(b). (49a-56a)

Defendants then filed Rule 60(a) and (b) Motions before the District Court. In support of their Motion they filed voluminous expert studies and affidavits that they labeled newly discovered evidence. The Commonwealth, on the other hand, had to rebut all this alleged newly discovered evidence.

In essence, the defendants retried the case before the District Court on documents.

On August 8, 1979, the District Court denied defendants' Rule 60 Motions. The Court expressed its serious reservations as to whether the Motions complied with the requirements of Rule 60(b) (2), but in any event examined defendants' materials and found nothing that would move it to alter its original decision.[2]

2. *The Proceedings in the Court of Appeals*

The United States Court of Appeals affirmed the District Court's findings as to *in personam* jurisdiction over the insurance company (24a-30a) and that the E.Q.B. had cognizable cause of action to recover the total value of the damages caused to the environment and/or the natural resources. (31a-33a) The Court of Appeals, however, vacated the District Court's award of damages as measured on the basis of six cents per animal (45a-46a) and remanded the case to the District Court for reevaluation of the damages (47a-48a). A cross-petition for writ of certiorari on said issue has been timely filed by the Commonwealth of Puerto Rico and the E.Q.B., respondents herein.

a. *Jurisdiction*

On the issue of whether West of England properly availed itself of the privilege of conducting business transactions within the Commonwealth of Puerto Rico, thus invoking the benefit and protection of the laws of the Commonwealth of Puerto Rico, the Court decided that the files of the Puerto Rico correspondent of West of England revealed the many instances

[2] In its Order of August 8, 1979, the District Court gives a detailed reasoning as to the method it adopted for computing the damages awarded. The same is attached to the instant Brief as Appendix "A".

in which ships insured by West of England were involved in incidents giving rise to claims or potential claims while the ships were present in Puerto Rico waters. In each of these instances West of England's local correspondent was instructed to take action to forestall claims, to provide services for the shipowners or to prepare for any eventual litigation. The West of England advertised to insured shipowners the fact that such services would be available through its local Puerto Rico correspondent. The contract of insurance contained no provision preventing any ship from calling on Puerto Rico or limiting coverage in the event it did. Not only did West of England know that vessels mentioned in West of England's correspondent's files visited Puerto Rico but it stood to reason that many other West of England insured vessels also did, as West of England's correspondent's files would name only vessels on which claims or other noteworthy incidents occurred. While West of England was not engaged in selling insurance in Puerto Rico, its retention of a correspondent to perform services for insured owners and vessels in Puerto Rico demonstrated that West of England plainly expected its worldwide business of insuring maritime risks to embrace the territorial waters of Puerto Rico with some regularity. West of England plainly knew that vessels it insured would call on Puerto Rico from time to time and it made no apparent effort to halt or limit this practice. In fact by advertising the name of its local correspondent in San Juan, West of England affirmatively encouraged such commerce. It was further determined that this is not a case of a single isolated and unpreventable appearance of an insured vessel in Puerto Rico waters; the record shows that such appearances were a readily foreseeable part of the normal course of business.

The Court of Appeals, after distinguishing the instant case from *World-Wide Volkswagen Corp* v. *Woodson*, 444 U.S. 286 (1980) held:

> "Where as here, the insurer has the means available to structure its primary conduct so as to control the area within which it will be subject to direct action, *where it is undoubtedly aware that the objects of its policies are regularly present in a particular jurisdiction, and where it not only does not act to curtail such presence but actively promotes it by providing contractual services in the jurisdiction, we hold that such an insurer is amenable to personal jurisdiction in the forum.*" (Emphasis added) (30a)

b. *The Striking of the Pleadings*

Defendants contended that the District Court abused its discretion by striking their pleadings on the issue of liability and their petition for exoneration from and/or limitation of liability. The Court of Appeals, after reviewing the record and analyzing the facts, held:

> "...the record supports the District Court's findings that defendants' conduct was *inexcusably recalcitrant* and that *it materially prejudiced plaintiffs' trial preparation and the court's legitimate efforts to keep this protracted law suit moving forward.*" (Emphasis added) (21a)

The Court of Appeals, citing *Higuera* v. *Pueblo International, Inc.*, 585 F2d 555, 557 (C.A. 1st 1978) stated:

> "There comes a point when the question arises who is running the court — counsel or the judge. To this there can be but one answer." (22a)

The defenses being stricken, defendants are now precluded or estopped from raising them before this Court much less argue them.

c. *The Damages*

The Court of Appeals held that the Commonwealth of Puerto Rico, exercising its undisputed authority to protect and conserve its natural environment, had, by statute (Section 1131(29) of the Puerto Rico Public Policy Environmental Act, 12 L.P.R.A. 1131(29)), authorized one of its agencies to maintain actions of this sort.

The Court correctly rejected defendants' contention that damages should be measured by any diminution in market value or loss of use of the affected property or of any loss of commercially valuable plant or animal life. The Court held that a strict application of the diminution in value rule would deny the Commonwealth of Puerto Rico any right to recover meaningful damages for harm to such areas and would frustrate appropriate measures to restore or rehabilitate the environment. The Court of Appeals set the following standard for determining damages in a case such as this:

> "We think the appropriate primary standard for determining damages in a case such as this is the cost reasonably to be incurred by the sovereign or its designated agency to restore or rehabilitate the environment in the affected area to its pre-existing condition or as close thereto as is feasible without grossly disproportionate expenditures." (40a-41a)

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION UPHOLDING PERSONAL JURISDICTION OVER THE WEST OF ENGLAND, IS IN CONSONANCE WITH THE MANDATE OF THIS COURT AND THEREFORE, THE WRIT SHOULD BE DENIED.

The Court of Appeals' decision that the District Court's exercise of personal jurisdiction over West of England did not of-

fend the limitations imposed by the Due Process Clause of the United States Constitution follows the decisions of this Court.[3] Its decision followed the decision of this Court that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). The Court of Appeals also followed the ruling of this Court in *World-Wide Volkswagen Corp* v. *Woodson, supra.* For West of England to be subjected to the jurisdiction of the District Court it had to, "purposefully avail itself of the privilege of conducting activities within the foreign state, thus invoking the benefits and protection of its laws". *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958). In this respect the Court of Appeals stated:

> "The record makes clear that West of England did precisely that." (26a)

A. *West of England's Presence in Puerto Rico*

West of England for years had a correspondent in Puerto Rico. The correspondent was appointed by West of England in San Juan to service and assist insured shipowners, their agents

[3] Petitioners' reference at pages 2 and 11 of their brief to the Due Process and Equal Protection Clauses of Section 2 of the Organic Act of Puerto Rico, 48 U.S.C. 737 is not accurate. Section 2 was repealed except for the last paragraph by Section 5 of Public Law 600, approved July 3, 1950, which provided that at such time as the Constitution of Puerto Rico becomes effective, Section 2 of the Organic Act of 1917, except the last paragraph, shall be deemed repealed. See Historical Note at 48 U.S.C. 731. The Constitution of Puerto Rico was approved by Congress on July 3, 1952, and came into force and effect on July 25, 1952, see 48 U.S.C. 731d.

and masters of vessels insured in cases of emergency and difficulty connected with matters covered by West of England's policy of insurance.[4]

West of England, in a document entitled "Investigation of Claims in Foreign Ports", provided its Puerto Rican correspondent with written instructions of how to conduct its business in order to provide insured shipowners, their agents and masters of insured vessels, while in Puerto Rico, services in cases of emergency or difficulty connected with matters covered by West of England's policy of insurance.[5]

In the first paragraph of page 3, that document states:

> "The day-to-day business of The West of England (Luxembourg) is managed by The West of England (London) to whom all correspondence should be addressed. The Association does not appoint agents. Commercial and also legal firms are, however, appointed in the principal ports of the world in order to assist Masters and Ship's Agents when required in relation to claims which

[4] Upon defendants filing their motion to quash service and dismiss the complaint, plaintiffs took the deposition of one of the partners of the Law Firm of Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, West of England's correspondent in San Juan and subpoenaed the documents in Hartzell's possession to establish (1) Hartzell's relationship with West of England and (2) West of England's business contacts with Puerto Rico. West of England produced a pamphlet of instructions to members and correspondents entitled, "Investigation of Claims in Foreign Ports", which was marked as Exhibit I; it also produced its "List of Vessels" insured marked as Exhibit 2; West of England's "List of Correspondents" as Exhibit 3 and West of England's "Rules or Policy" as Exhibit 4. It also produced 20 files containing approximately 320 documents from where West of England's activities with Puerto Rico clearly appeared. All this evidence was submitted by plaintiffs to the court in support of its Brief filed in opposition to defendants' motion to quash summons and to dismiss the complaint on January 30, 1976. (S.A. 48-623).

[5] Said document is reproduced as Appendix B to the instant Brief. (pp. 38-49 *infra*)

fall within the scope of the cover afforded to its Members by the Association, as set out in the Rules."

West of England's "List of Correspondents" contains the name and addresses of all its correspondents throughout the world, and in the introductory paragraph of that document at page 9, it provides:

> "Whilst the Association does not appoint agents, the following are the names of experts and lawyers usually engaged to advise on claims in which the Association is concerned. Captains and agents should consult them in cases of emergency and difficulty connected with matters covered by the Rules to this Association, when there is not time to apply to their owners for instructions.
>
> "In ports where the Association is not specially represented the Captain or his agents should communicate with the Association or telegraph ("WESTENG" - London) for instructions in connection with any serious claim covered by the Rules."

At page 20 of that same Exhibit the name of West of England's representative in Puerto Rico appears advertised. It reads:

> "San Juan (Puerto Rico) - *Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, 1530 Banco Popular Center, Hato Rey, Telephone (809) 765-6075, Telex CW-WUI 3654204 (Hartzell)."
> *Asterisk denotes Lawyers. (S.A.183, 172).[6]

In presenting to this court the questions to be decided, West of England intimates that the only function of West of

[6] Pertinent pages of this document appear reproduced, as Appendix "C" to the instant Brief (pp. 50-54 *infra*).

England's correspondent in Puerto Rico was that of lawyers and nothing else. When West of England appoints a commercial firm as correspondent in a given port, the function of that correspondent obviously is not that of a lawyer for West of England in that particular port. Its functions are going to be related with the insurance business.[7]

Plaintiffs proved to the District Court that West of England's Puerto Rico correspondent acted on its behalf in 27 instances in which a total of 25 vessels had incidents prior to the ZOE COLOCOTRONI casualty.[8] In relation to those incidents the correspondent performed the following services: Made all the arrangements for the burial of a deceased seaman with appropriate religious observances; repatriated by air several other sailors; contracted surveyors to conduct numerous surveys; investigated claims for damages or injuries; adjusted and settled claims; appointed ship agents for insured shipowners; paid insured shipowners' agent's disbursements incurred in attending vessels in Puerto Rico; repatriated stowaways and deserters; recommended to West of England lawyers in the Dominican Republic; took care of and rendered assistance to sick and injured foreign seamen while in Puerto Rico and the Virgin Islands; assisted insured owners in collec-

[7] In *United States* v. *SS. Ocean Eagle*, 47 F.R.D. 519 (1969) a West of England competitor, The London Steam-Ship Owners' Mutual Insurance Association Ltd., appointed William Munch, Inc., a cargo surveyor and marine claims settling agent as its representative in Puerto Rico. The London Club in that case made the same jurisdictional allegations that West of England is making in the instant case and the court upheld the jurisdiction. The court in arriving at the decision analyzed not just the London Club's mode of operating but the many instances in which it conducted business within Puerto Rico through William Munch, Inc., a non-lawyer. The Hartzell law firm, while acting as correspondent for West of England, carried out the same activities for West of England as William Munch, Inc., a commercial firm, conducted for The London Club according to the facts of that case.

[8] The evidence proving these facts is analyzed in S.A. 14-34.

ting freight; arranged for insured owners salvage services; assisted insured owners whenever a ship caused damage to port facilities; assisted in the release of seamen from jail and repatriation; and mitigated Immigration fines imposed to insured shipowners. West of England advertised to insured shipowners the fact that such services would be available through its local Puerto Rican correspondent.[9]

Yet, defendants, as a reason for granting the Writ, ignoring the voluminous evidence in the record evidencing the many business contacts West of England had with the forum prior to the ZOE COLOCOTRONI's casualty, and ignoring the analysis of that evidence made by both the District Court and the Court of Appeals in their respective decisions, argued that the District Court predicated Long Arm jurisdiction on West of England's insurance contract with the owners of the ZOE COLOCOTRONI which insured against risks encountered whenever the vessel might travel. Said party unbelievably argued that no action was cited by the Court of Appeals as a ground upon which the District Court exercised personal jurisdiction. Furthermore it intimated that the only basis for upholding jurisdiction was West of England's failure specifically to exclude Puerto Rico from the coverage of the insurance policy. That is definitely not what the evidence in the record and the two lower court opinions reflect. One receives the impression, following defendants' argument, that the Court automatically will have *in personam* jurisdiction over West of England for its failure to exclude Puerto Rican ports from the coverage of the policy. Defendants failed to bring to the attention of the Court that besides the non-exclusion of the ports from coverage in the policy for years West of England had engaged in business transactions in Puerto Rico through its correspondent. So the basis upon which the Court predicated Long Arm jurisdiction in this case is not just the fact that West

[9] The evidence proving all the above facts appears in S.A. 48-623.

of England failed to exclude or exempt the Puerto Rican ports from the policy but also the various business contacts it had with Puerto Rico.

As this argument of defendants has no merit and is contrary to what the record reflects, the Petition for Writ of Certiorari should be denied.

B. *The Decision of the Court of Appeals is Not in Conflict with* World-Wide Volkswagen Corp. *v.* Woodson, Supra.

In *Woodson, supra,* the Court dealt with facts completely different from those of the instant case. Furthermore, the scope of the Commonwealth of Puerto Rico's Long Arm *in personam* jurisdiction as defined by the case of *International Shoe* v. *Washington, supra; McGee* v. *International Life Insurance Company,* 355 U.S. 220 (1957); *Hanson* v. *Denckla, supra,* and other more recent cases, has been reaffirmed by *Woodson. Woodson* by no means supports defendants' position.

In *Woodson, supra,* respondents did not adduce any evidence that either the dealer or the distributor did any business in Oklahoma, site of the accident. They did not present either any evidence that they shipped or sold any products to or in the state; nor did it have an agent to receive process there; nor did it purchase advertisements in any media calculated to reach Oklahoma. It was even conceded that there was no showing that any automobile sold by respondents had ever entered Oklahoma with the single exception of the vehicle involved in that case.

In the present action, West of England, through its appointed correspondent, conducted business in Puerto Rico and prior to the ZOE COLOCOTRONI oil spill West of England had attended business matters of other ships in Puerto Rico through its correspondent. These considerations alone are sufficient to factually distinguish *Woodson, supra,* from this case.

There can be little, if any, comparison between a car distributor and a dealer whose operations are limited to no more than three states and a Shipowners' Mutual Insurance Association, like West of England, whose business is worldwide, as is clearly shown by its list of correspondents.[10]

That ships insured by West of England would come to Puerto Rico was a foreseeable event. It was not only foreseeable that some of the ships insured by West of England would run into difficulties in Puerto Rico, it was actually expected. What other reasons could there exist for the appointment of a correspondent in Puerto Rico?

Foreseeability is a relevant factor to determine whether or not *in personam* jurisdiction exists over a party. In *Woodson, supra*, at 297 the Court held:

> "The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."

A ship, unlike a car, does not usually move within a limited area, much less a tanker in today's oil-strained world. This was a well-known fact to West of England. The presence of the ZOE COLOCOTRONI in Puerto Rico was much more than a mere likelihood. It was an expected event. West of England foresaw that it could have been haled into court in this forum.

Unlike in *Woodson, supra*, West of England availed itself of the benefits and privileges of the laws of Puerto Rico through its correspondent. Unlike in *Woodson*, plaintiffs did not seek to base jurisdiction on one isolated occurrence of fortuitous characteristics. Unlike in *Woodson*, it is reasonable to require West of England to defend this particular suit and Puerto

[10] (SA167-186)

Rico's interest in adjudicating this dispute is a relevant factor that has to be considered. Finally, Puerto Rico does not offend the Due Process Clause by exercising its jurisdiction over a corporation which voluntarily insures ships which knowingly engage in commerce between ports of the world and Puerto Rico.

The instant case does not deal with a foreign corporation whose only contact with the forum was the fortuity that the car they sold passed through the forum after it had left their hands. Here West of England had appointed a correspondent to attend to the obligations it had assumed in the policy towards its insured shipowners, their agents and ships' captains, "in cases of emergency and difficulty connected with matters covered by the Rules of the Association". (SA172)

The West of England argued it had no property in Puerto Rico; never solicited nor sold insurance in Puerto Rico; no member of West of England is a resident of Puerto Rico. But, West of England cannot ignore the fact that surveying, investigating, adjusting and settling of claims and providing its insured shipowners, their agents and ships in Puerto Rico with whatever services are needed in cases of emergency and difficulty connected with matters covered by the policy are very important parts of West of England's insurance business.

In the light of all the above, plaintiffs submit that West of England was at the time of the casualty present in Puerto Rico and the Petition for Writ of Certiorari should be denied.

C. *The Court Below Did Not Devise a "Minimum Contact" Rule for West of England*

The Court did not deny West of England's right to the equal protection of the laws. Defendants argue that the Court of Appeals devised a special minimum-contacts rule for insurance companies which would deny them equal protection of the laws. They base this argument on what the Court of Appeals said in Footnote 18 of the Opinion, which reads as follows:

> "...the result we reach is further buttressed by the Supreme Court's occasional suggestions that the test for measuring minimum contacts for insurance companies may be somewhat less stringent than for other nonresident corporations because of the forum state's public policy interest in promoting effective redress for injuries. See *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957); cf. *Hanson* v. *Denckla*, 357 U.S. 235, 252 (1958). Here the maritime accident resulted in injury to Puerto Rico's coastal environment, and plaintiffs represented this forum-related interest." (30a)

With that statement the court was adding support to results already reached in the decision. The Court found jurisdiction over West of England not because Puerto Rico's public policy interest in promoting effective redress for injuries made the contacts for insurance companies somewhat less stringent than for other nonresident corporations. Jurisdiction was upheld because of West of England's frequency, quantity and quality of all its contacts within Puerto Rico.

Defendants would be correct in making such an argument had the contacts of West of England with Puerto Rico been non-existent or insignificant as in *Woodson, supra*. Upholding jurisdiction resting on that type of contact would obviously constitute the discriminatory treatment that West of England is alleging. However, defendants fail to inform the Court that West of England's contacts with Puerto Rico were not that meaningless. They were frequent and substantial; much more substantial than the contact International Life Insurance Co. had with the State of California in *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957).

In *McGee* an insurance policy which had been taken out with an Arizona corporation was later assumed by the defendant, a Texas corporation, which issued a reinsurance certificate by mail to the insured in California. Thereafter, the

defendant mailed premium notices to the insured in California who in turn mailed the premium payments to the defendant in Texas. The insurance company had absolutely no other contact with the forum. In the instant case West of England appointed a correspondent in Puerto Rico. Then a number of insured ships were sent to Puerto Rico, where their owners, agents and masters received from West of England, through its correspondents, those services which it had to provide in accordance with the policy.

This Court, in *Hanson* v. *Denckla*, *supra*, repeated and followed the privileged concept enunciated in *International Shoe Co.*, *supra*, *Id.* 319, 321. *Denckla* stands for the proposition that to be present the defendant must voluntarily do some act, which, if performed, is expected to have effects in the forum state. West of England's appointment of a correspondent in Puerto Rico through which its business could be transacted, is the act to which this Court referred in *International Shoe Co.*, *supra*, and *Denckla*, *supra*.

II. Defendants' Second Reason for Granting the Writ is Being Improperly Presented to This Court as They Raise a Defense That Was Stricken and Otherwise Waived by the Defendants.

In their second reason for granting the writ defendants argued that they are free to oppose the "no action" clause in the policy because the invalidation of these clauses in Section 11.190 of the Insurance Code of Puerto Rico (26 L.P.R.A. 1119) is ineffective, as the policy was not delivered or issued for delivery in Puerto Rico.

Section 11.190 does not apply to the facts of this case, not because of the reason advanced by defendants in pages 16-17 of the Petition but because the cited section is part of Chapter II of the Insurance Code of the Commonwealth of Puerto Rico (26 L.P.R.A. 1101-1137) which in Section 11.010 (26

L.P.R.A. 1101) expressly excluded protection and indemnity insurance from its scope. It provides:

> "1101 Scope of Chapter
> "(1) The applicable provisions of this chapter shall apply to insurance other than *ocean marine* ...
> "(2) For the purpose of subsection (1) and this title, '*ocean marine* and foreign trade insurances' shall include only; (a) insurances upon vessels, crafts, hulls and of interest therein or with relation thereto; (b) insurance of marine builders risks, marine war risk, and *contracts of marine protection and indemnity insurance*. . ." (Emphasis added)

In the fourth question presented for review by this Court and in the argument commencing on page 16 of the Petition, defendants did not raise a jurisdictional question, rather they posed the question of whether the complaint failed to state a claim against West of England upon which relief can be granted, one of the affirmative defenses which they could have raised in their responsive pleadings or by separate Motion. If the alleged "no action" clauses preclude plaintiffs' direct action for the reasons advanced by defendants, the question is one of sufficiency of the cause of action or claim for relief, not one of jurisdiction over the person or over the subject matter. Presenting this question for review to this Court is most improper. If that defense was raised in the responsive pleadings, same was stricken by the Court on October 21, 1977.

Moreover the question of whether the District Court abused its discretion in striking their pleadings and defenses and the question of whether it erred in upholding *in personam* jurisdiction over West of England were presented for review before the Court of Appeals, but there the defendants failed to make the argument they are now making, thus depriving the Court of Appeals from ruling on it. The Court of Appeals for

the reasons stated in its Opinion affirmed the District Court. (16a-23a)

In their Petition defendants did not present for review that part of the Court of Appeals' decision upholding the District Court's striking of defendants' pleadings and preventing their defenses from being considered on the merits. Yet they dare argue a defense that was struck below and of which they did not seek review before this Court. Defendants are precluded from arguing this question before this Court as a reason for granting the Writ.

Assuming arguendo that defendants could raise that defense before this Court, their argument would still be meritless.

What defendants call the "no action" clause in the policy[11] is actually a prohibition which only affects the insured not the injured. The insured shipowner cannot exercise his "right to recover from the funds" of West of England "in respect of any liability" until "he shall first have discharged or paid the same". That is not a "no action" clause. The "no action" clause prevents suits of recovery by any person against the insurer. See text of a "no action" clause in *Watson* v. *Employers' Liability Assurance Corporation, Ltd.*, 348 U.S. 66, 74-75 (1954). But assuming arguendo the clause is a "no action" clause, the same is expressly prohibited by section 20.010 of the Insurance Code of Puerto Rico, 26 L.P.R.A. 2001, which provides:

> "The insurer issuing a policy insuring any person against loss or damage through legal liability for the bodily injury, death, or damage to property of a third person,

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[11] Payment First by Insured Owner

"18. Unless the Association in its absolute discretion shall otherwise determine it shall be a condition precedent of an insured Owner's right to recover from the funds of the Association in respect of any liability, costs or expenses that he shall first have discharged or paid the same." (SA 198)

shall become absolutely liable whenever a loss covered by the policy occurs, *and payment of such loss by the insurer to the extent of its liability therefore under the policy shall not depend upon payment by the insured or upon any final judgment against him arising out of such occurrence.*" (Emphasis added)

It has been held that the direct action statute nullifies altogether a "no action" clause and gives to the injured person the right to proceed against the insurer directly either alone or together with the insured before recovery of a judgment against the insured. *Olympic Towing* v. *Nebel Towing Co.*, 419 F2d 230, 236-237 (1969).

The "no action" clause defense, like "failure of notice" is a technical defense in respect to which the insurer is severly restricted in advancing if not foreclosed from asserting. *Lumbermen's Mutual Casualty Company* v. *Elbert*, 348 U.S. 48, 51 (1954).

The loss being claimed by the plaintiffs was covered by the policy.[12]

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[12] E. (1) For loss or damage caused to any property or for infringement of any rights relating to property, whether on land or on water or whether fixed or movable,...

(2) Subject to acceptance in writing of the risk by the Association on such terms and conditions as the Association may determine, for liabilities arising under the Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution dated 7th January, 1969 (TOVALOP) and also for any costs and expenses reasonably incurred with the prior approval of the Association (regardless of fault on the part of the insured vessel) for the purpose of avoiding or minimising such liabilities; PROVIDED ALWAYS that the Association's liability under this Sub-Rule shall in respect of each incident be limited to U.S. $100 per G.R.T. subject to a maximum of U.S. $10,000,000. (S.A. 193-194)

III. The Clear Language of Section 1131(29), 12 L.P.R.A. 1131(29) of the Public Policy Environmental Act of the Commonwealth of Puerto Rico Provides for Recovery of the Total Value of the Damages Caused to the Environment and/or Natural Resources by the Polluter.

Plaintiffs, respondents herein, are filing a cross-petition for a Writ of Certiorari on the issue of the measure of damages. The discussion that follows is limited to the reasons advanced as to why Certiorari should not issue on the Petition filed by the defendants.

Defendants do not question, nor could they, the power of the Commonwealth of Puerto Rico to enact legislation for the protection and conservation of its natural resources. 48 U.S.C. 746, 747, 749, Art. VI, Sec. 19, Const. Com. of P.R.; 12 L.P.R.A. 43, 44; 31 L.P.R.A. 1023.[13] In the exercise of this undisputed authority to protect and conserve the resources held in trust for its people, the Commonwealth has by statute authorized one of its agencies, co-plaintiff, the Environmental Quality Board, to maintain actions to recover from polluters the value of the damages caused to the environment. 12 L.P.R.A. 1131(29). This exercise of the police power of the Commonwealth of Puerto Rico has not been alleged to be invalid.[14]

[13] The previously cited Constitutional and statutory provisions, Art. VI, Sec. 19 of the Constitution of Puerto Rico; 48 U.S.C.A. 746, 747, 749, 12 L.P.R.A. 43, 44; 31 L.P.R.A. 1023, are set forth in full in Appendix "D" (pp. 55-57 *infra*)

[14] In addition to the E.Q.B.'s allegation in the complaint under Section 12 L.P.R.A. 1131(29), the Commonwealth of Puerto Rico also alleged a cause of action under its common law right as trustee of the Commonwealth's natural resources, in its quasi-sovereign capacity and in its capacity as *parens patriae*. The District Court found that the Commonwealth had standing to sue to recover for oil pollution harm to Bahia Sucia and related resources "because it has proprietary interest in the same . . . . because it is the trustee of the

Under Section 1131(29) of 12 L.P.R.A., the E.Q.B. has, among others, the following duties, powers and functions:

> "To bring, represented by the Secretary of Justice, by the Board's attorneys or by a private attorney contracted for such purpose, civil actions for damages in any court of Puerto Rico or the United States of America *to recover the total value of the damages caused to the environment and/or natural resources,* upon committing any violation of this chapter and its regulations. The amount of any judgment collected to such effect shall be converted into the special account of the Board on environmental quality." (Emphasis added) . (160a)

The Court of Appeals found that this statute both created a cause of action as the type described by its terms and designated the E.Q.B. as the proper party to bring such an action (33a), upon violation of the anti-pollution provisions, 24 L.P.R.A. 595.[15]

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public trust in those resources...and additionally, in its capacity as parens patriae..." (69a). The Court of Appeals held that the Commonwealth had by statute authorized the E.Q.B. as the proper party to bring this action, and in order to avoid the risk of double recovery and possible confusion, the Court found it unnecessary to consider whether, had the Legislature of Puerto Rico not delegated to the E.Q.B. the right to maintain such suits, the Commonwealth would have an inherent right to bring it itself (33a-34a). However, other Federal courts have addressed this question and have held that a state has a sovereign interest in its coastal waters and natural resources sufficient to maintain a "parens patriae" action on behalf of its citizens to protect such interests. *Maine* v. *M/T Tamano*, 357 F.Supp. 1097 (D.Me. 1973); *Matter of Oswego Barge Co.*, 439 F.Supp 312, 321-322 (D.N.Y. 1977); *Maryland* v. *Amerada Hess*, 350 F.Supp 1060 (1972).

[15] "It shall be unlawful for any person, directly or indirectly to throw, discharge, pour or dump or permit to throw, discharge, pour or dump into the waters, any organic or non-organic material capable of polluting or leading to the pollution of said waters as to place them out of the minimum standards of purity that the Secretary of Health may establish under Section 599 of this Title."

Unable to challenge the E.Q.B.'s right to maintain this action, and unable to allege any constitutional bar to the legislation that empowers the E.Q.B. to seek damages to recover the total value of the damages caused to the environment and/or natural resources (33a), defendants in their eleventh hour, attack the clear language contained in the statute and allege that the Court of Appeals' interpretation of the same is "novel and expansive". (Defendants' Petition, p. 17).

Defendants argue that the measure of damages envisioned by the E.Q.B.'s statute is the common law "diminution in value" rule. Under said rule the measure of damages for tortious injury to real property is the difference in the commercial or market value of the property before and after the event causing injury. They cite *Restatement (2nd) of Torts*, Section 929, 1(a) 1979. Defendants' next argue that since there has been no reduction in the per acre commercial market value of the land area of Bahia Sucia, the Commonwealth of Puerto Rico and the E.Q.B. are not entitled to recover any damages for the injuries caused by defendants' intentional dumping of 1-1/2 million gallons of crude oil into the coastal waters of Puerto Rico.[16] Defendants' reasoning is clearly contrary to the manifest intent of Puerto Rico's Environmental Statute which authorizes the E.Q.B. to recover the total value of the damages caused to the environment and/or natural resources. (36a) Acceptance of defendants' proposition which finds absolutely no support in the statute or in logic, would effectively deny the government the power to regulate and protect the natural resources entrusted to its care while permitting polluters to escape liability for the destruction of natural resources they often cause.

The Court of Appeals placed defendants' allegations in proper perspective when it stated:

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[16] Defendants candidly state that it is "undisputed that Mangrove trees and marine organisms were killed by the oil spill ... and that the Commonwealth of Puerto Rico is the owner of the entire area polluted by oil. (Defendants' Petition, p. 3).

"We believe that defendants have misconceived the character of the remedy created by Section 1131. The E.Q.B. is not concerned with any loss in the market or other commercial value of the Commonwealth's land. In point of fact, the E.Q.B. concedes the land has no significant commercial or market value. The claim, rather, is for the injury— broadly conceived—that has been caused to the natural environment by the oil spill. ...the District Court found that the once flourishing natural environment of the West Mangrove had been seriously damaged by the oil, to the point where some of the underlying sediments were no longer capable of supporting any but the most primitive forms of organic life, such as worms. The Puerto Rico statute authorizing this action specifically empowers the E.Q.B. to recover 'the total value of the damages caused to the environment and/or natural resources' upon a violation of the antipollution provisions. 12 L.P.R.A. 1131(29). Implicit in this choice of language we think is a determination not to restrict the state to ordinary market damages. Many natural areas of considerable ecological value have little or no commercial or market value. Indeed, to the extent such areas having commercial value it is logical to assume that they will not long remain unspoiled, absent some governmental or philanthropic protection. A strict application of the diminution value rule would deny the state any right to recover meaningful damages for harm to such areas, and would frustrate measures to restore or rehabilitate the environment." (36a-37a)[17]

[17] Inasmuch as the Court of Appeals recognized that the E.Q.B. is entitled to recover the "total value of the damages to the environment, and/or natural resources" and that the damage determination is not restricted to "ordinary market value", it was an error to vacate the District Court's award based on replacement cost of the animals destroyed. This matter is covered at length in the Commonwealth's Cross-Petition for Writ of Certiorari.

Puerto Rico's environmental statute is by no means unique or novel. Governmental and public awareness of the need to conserve and protect limited natural resources, as well as their growing knowledge of the consequences of oil pollution has led the Federal government and the governments of various states to enact legislation.[18]

Various Federal and state courts have recognized the right of a state to seek damages for injury to living non-commercial resources. *Burgess* v. *M/V Tamano*, 564 F.2d 964 (C.A. 1st 1977), *cert. den.*, 435 U.S. 941 (1978); *California Department of Fish and Game* v. *SS Bournemouth*, 307 F.Supp 922 (1969); *Maine* v. *M/V Tamano*, 357 F.Supp 1102 (1973); *State Ex-Rel Pollution Control* v. *Kerr, McGee Corp*, 532 P2d 1386 (Okla. 1975); *State* v. *Jersey Power and Light Co.*, 308 A.2nd 671 (1973); *Maryland* v. *Amerada Hess*, 350 F.Supp 1060 (D. Me. 1972); *Department of Pollution Control* v. *International Paper Co.*, 329 S.2nd 5 (Fla. 1976). Defendants have not advanced any valid reason that would justify disregarding the clear language of Section 1131 and apply a rule of common law damages which was intended for private property, real and personal, with a market value, and which has no place in a case filed by a sovereign seeking to recover damages to the

[18] Restoration or replacement costs of the natural resources damaged is the measure of damages contained in the Clean Water Act, 33 U.S.C. 1321(f)(5) and the OCS Lands Act, 43 U.S.C. 1813(b)(3). Replacement cost is also being used in state programs established to recover for living, natural resources damage. Florida (F.S.A. Sec. 376.11(5) (c) (1974);

Maryland (A.C.md. Natural Resources Sec. 8-1411(f) (1974); Massachusetts (M.G.L.A. c.21 Sec. 27(10) (1973); Mississippi (M.A.C. Sec. 49-27-55 (1979 Supp.)); New Jersey (N.J.S.A. 58:10-23.11g(a) (2) (1979 Supp.)); New York (N.Y. Nar. L. 181(2)(b) (1979 Supp.)); North Carolina (N.C.G.S. Sec. 143-215.90 (1979 Supp.)); Oklahoma (82 O.S.A. Sec. 937(b) (1971)); Oregon (O.R.S. Sec. 468-745 (1977)); Virginia (Va. Code Sec. 62.1-44.15(11) (a)); Washington (R.C.W. Sec. 90.48.142 (1977)). The previously cited statutory provisions are set forth in full in Appendix "E" to the instant brief.

natural resources that have been entrusted to its protection. The importance of preserving and protecting these resources carries with it the need of an adequate remedy against the tortfeasor to recover the value of the damage caused to the environment or the natural resources. (36a-39a, 67a, 70a).

As the Court of Appeals stated:

> "In recent times, mankind has become increasingly aware that the planet's resources are finite and that portions of the land and sea which at first glance seemed useless, like salt marshes, barrier reefs, and other coastal areas, often contribute in subtle but critical ways to an environment capable of supporting both human life and other forms of life on which we all depend. The Puerto Rico statute is obviously aimed at providing a damages remedy with sufficient scope to compensate for and deter the destruction of such resources; and while we can see many problems in fashioning such a remedy, we see no reason to try and frustrate that endeavor. We, therefore, do not limit damages herein to the loss of market value of the real estate affected." (39a)

The Commonwealth of Puerto Rico, in the present action, does not stand as a private citizen seeking to recover traditional damages to an injury to real property, but rather the claim of Puerto Rico is one for the loss of living, noncommercial resources of immense value to the People of Puerto Rico. (36a)

Ironically, the narrow scope of defendants' arguments overlook the most basic rule of tort recovery, one which was recognized by the Courts below—to place the injured party as nearly as possible in the same position he would have been in had there been no tort. (85a)

Defendants' oil spill constituted a breach of Federal maritime law (35a) and plaintiffs' claim for relief came within

the admiralty jurisdiction of the District Court. As stated by the Court of Appeals:

> "Where the injury occurs in the territorial waters of a state, the general rule is that admiralty will give 'broad recognition of the authority of the states to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to Federal laws or the essential features of an exclusive Federal jurisdiction (citations omitted) ..." (35a)

The measure of damages in this case would be no different than the measure of damages under maritime collison law. The maritime doctrine of *restitutio in integrum* calls for restoration of Bahia Sucia to its condition prior to the spill. *The Baltimore* v. *Rowland*, 75 U.S. 377, 385 (1869); *Barger* v. *Hanson*, 426 F.2d 640 (C.A. 9th 1970); *Standard Oil Corp.* v. *Southern Pacific Co.*, 268 U.S. 146 (1925); *National Steel Corp.* v. *Great Lakes Towing Co.*, 574 F.2d 339 (C.A. 6th 1978).

As recognized by the Court of Appeals, states may seek damages for injury to all natural resources, including those not generally traded commercially (37a-42a). As noted by the Court of Appeals, the course of recent Federal legislation in the area of oil pollution allowing representatives of any State to act on behalf of the Public Trust of the natural resources to recover for the cost of replacing or restoring such resources further shows the incompatibility of the diminution rule in recovery for environmental damages.[19] (37a-38a). Contrary to defendants' assertion, a State's claim is not precluded or limited by Section 311 of the Clean Water Act. 33 U.S.C. 1321

[19] Although these statutes came into effect after the trial, this Court has stated that environmental protection statutes may provide useful guidelines for interpreting the common law. *Illinois* v. *Milwaukee*, 406 U.S. 91, Note 5 (1972).

Complaint of Steuart Transportation, 435 F.Supp 798 (E.D. Va. 1977), aff'd. *Steuart Transportation Co.* v. *Allied Towing*, 596 F.2d 609 (C.A. 4th 1979); *In Re Complaint of Allied Towing*, 478 F.Supp 398 (E.D. Va. 1979).

Defendants have requested that a Writ of Certiorari be granted, alleging that the rejection of the diminution rule by the District Court and the Court of Appeals is in direct irreconcilable conflict with other decisions of other Court of Appeals. This statement is incorrect. Defendants have not cited one single case in which a Federal court has held that a state or its designated agency is limited to the diminution in the value of the real property when seeking compensation for the damages caused to its natural resources.

The cases cited by defendants in support of the "diminution value" rule merely restate common law principles for measuring losses resulting from injury or destruction of marketable or commercial property but are entirely inapprorpriate for measuring the damage society suffers when valuable living non-commercial resources are destroyed. As defendants are forced to admit (p. 20 of the Petition) when property has a special significance damage claims are not constrained by the diminution of market value. Restatement (2nd) of Torts, Sec. 929 (1)(a) Comment B (1979). *DeSpirito* v. *Bristol County Water Co.*, 102 R.I. 50, 227 A.2nd 782 (1967) (damage for destruction of wearing apparel not limited to market value); *Rector Wardens & Vestry of St. Christopher's Episcopal Church* v. *C. S. McCrossan Inc.*, 306 Minn. 535, 235 N.W.2d 609 (1975) (damage for destruction of shade tree not limited to market value diminution of land); see also *Stephenville N.& S.T.Ry. Co.* v. *Baker* (Texas Court of Civil Appeals) 203 S.W. 385 (1918) and *Louisville & Nashville R. Co.* v. *Beeker*, 126 Ky. 328, 103 S.W. 300 (1907); *Levi* v. *Schwartz*, 201 Md. 575, 95 A.2nd 322 (1953) (replacement costs in excess of market value diminution awarded for loss due to removal of lateral support). (39a)

The special significance and importance that Puerto Rico has placed on its limited natural resources cannot be overstated. Sec. 19 of Article VI of the Commonwealth's Constitution provides that:

> "It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the Community."

The Commonwealth is entrusted with the control of all the beaches and maritime terrestial zone abutting the navigable waters of Puerto Rico as well as the living and non-living resources there located, for the benefit of the People. 48 U.S.C.A. 746, 747, 749, 12 L.P.R.A. 43, 44. Because of the importance of these coastal areas and the natural resources they contain, these areas are not susceptible to private ownership, and, therefore, they cannot have a market value as does marketable or commercial property. 31 L.P.R.A. 1023.

For the foregoing reasons it is submitted that coastal resources such as those in Bahia Sucia having special significance to the People of Puerto Rico, damage claims to said natural resources are not constrained by the diminution of market value of the real estate, and in accordance with Section 11(29) of the Puerto Rico Environmental Act, the Commonwealth has a right to recover the total value of the damages caused to the environment and/or its natural resources.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil Number: 252-73

THE COMMONWEALTH OF PUERTO RICO and the ENVIRONMENTAL QUALITY BOARD OF THE COMMONWEALTH OF PUERTO RICO
Plaintiffs

v.

THE S.S. ZOE COLOCOTRONI, her engines, appurtenances, etc., et al.,
Defendants

ORDER

Pursuant to the Orders of the United States Court of Appeals for the First Circuit, April 24, 1979 and June 11, 1979, Defendants have filed two Motions under Rules 60(a) and (b) of the Rules of Federal Procedure, 28 U.S.C., for the correction of clerical mistakes and the vacating of Judgment. In the present Order we entertain both Motions.

Separate analysis of each follows below.

I. *The Rule 60(b) Motion.*

Although Rule 60(b) is a liberal remedial rule which draws on the historical authority of a court to avoid injustice it has its time, place, and circumstances. See gen.: 7 Wright & Miller, *Federal Practice and Procedure*, §2857 *et seq.* 7 *Moore's Federal Practice*, §60.18(8)-§60.24(5). It is not an invitation for a *de novo* assestment of the evidence, *Williams* v. *McKenzie*, 576 F. 2d 566, 570 (C.A. 4, 1978), or an opportunity to relitigate, *Posttape Associates* v. *Eastman Kodak Company*, 68 F.R.D. 323 (E.D.Pa., 1975), nor is it a substitute for an appeal, *Fackelman* v. *Bell*, 564 F. 2d 734 (C.A. 5,1977). Extraordinary relief, such as contemplated by Rule 60(b), calls for ex-

ceptional circumstances. See: *Horace* v. *St. Louis Southwestern Railroad Company*, 489 F. 2d 632 (C.A. 8, 1974).

In the instant action Defendants, citing different parts of the record and proceedings, have filed for relief from a judgment which in their view should not stand because of newly discovered evidence, surprise, mistake, fraud, and misrepresentation and misconduct by Plaintiffs.

Central and foremost in Defendants claims of entitlement to relief is the argument that a mistake was committed in the calculation of the area which sustained damage. From this, Defendants follow that the calculations as to the total animal and plant destruction must also be erroneous. In our decision of August 29, 1978 we made a finding of damage to marine organisms in approximately 20 acres and damage to mangrove area covering about 23 acres. We believed then, as we do now, that our study of the evidence submitted and our examination during the on site inspections justified such a finding. Nothing added by Defendants as an afterthought convinces us to the contrary.

As further grounds for relief Defendants state that they were surprised, misled, and misrepresented to by Plaintiffs. Surprise is claimed on the specifics of Plaintiffs' theory of recovery. Misrepresentation is alleged on the nature and source of authority for such a theory. Defendants state they were misled when Plaintiffs changed their claim for relief. With respect to these contentions we simply state that the amended complaint sufficiently put Defendants on notice as to what it was that compensation was sought for, and that the record of discovery proceedings would reveal that Defendants had adequate notice as to what this compensation encompassed. We cannot label these contentions a "surprise" if Defendants chose not to further investigate, pursue, or follow up on information it had received in the pleadings and during discovery.[1] Nor can we

[1] Curiously enough no allegation is made under the "excusable neglect" provision of Rule 60(b).

label them "misleading" if Defendants chose to disbelieve and pursue another avenue of litigation strategy. "Rule 60(b) is not to be invoked to give relief to a party who has chosen a course of action which in retrospect appears unfortunate or where error or miscalculation is traceable really to a lack of care." *Sadowsky* v. *Bombardier Ltd.*, 530 F. 2d 615, 618 (C.A. 7, 1976).

The argument that Plaintiffs misrepresented their theory of recovery is close to the argument that we erred in the method we adopted to calculate the amount of damages. The gist of both is that there is no authority for such a formula for relief and that Plaintiffs' witness misrepresented that there was.

In the present action we have found a recoverable wrong. It is an ancient, elementary, and hardly novel principle of law, that a transgressor correct or compensate that party which he has injured.[2] Where the assestment of the amount of recovery is a complex question by reason of the facts and the relative newness of the field in question, the Court's task will undoubtedly be more difficult. But this can hardly excuse the fashioning of an adequate remedy. And in terms of difficulty, we cannot compare the present case's situation with that encountered in the valuation of human life or limbs, an everyday occurrence in the courts, on which subject no aid is received from available catalogues.[3]

The law knows no magic formula for computation of an award of damages.[4] What is required is only that damages

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[2] See gen.: Wigmore, "Responsibility for Tortious Acts: Its History", 7 HARV. L. REV. 315, 1383, 448 (1894).

[3] Note: 74 Am.Jur. 2d., Torts, §74.

[4] Upon close examination the method we adopted is in fact no radical deviation from traditional norms. In most general terms damages for "physical harm to [property] is closely tied with the concept of value... Value necessarily involves the idea of some standard by which it can be determined. What we are looking for is the financial equivalent of the property or the harm to it. ... The theory underlying this is that the Plaintiff, given his financial equivalent,

awarded have their bases in the evidence presented before a Court. Here there was sufficient evidence to sustain our findings. We are of the opinion that the method used, the "lowest possible replacement cost", has support in the record and is a fair and equitable method of assessing damages under the particular setting of this case. To the extent the Defendants argue that the method of damage computation is a judicial mistake, that we wrongly decided a point of law, the issue is technically the proper subject for adjudication on appeal rather than review on a Rule 60(b) Motion. See: *Silk* v. *Sandoval*, 435 F. 2d 1266 (C.A. 1, 1971) cert. den. 402 U.S. 1012 (1971).

The last areas of concern in Defendants' Motion for relief concern the scientific accuracy of tests performed and submitted into evidence and objected references to certain catalogues which set or did not set market values on the organisms destroyed in the case before us. With respect to these points Defendants have submitted: the report of an expert done after the entry of Judgment, and affidavits from nine persons involved in some facet of the biological supply field. Both submissions are impressive examples of steps that should have taken place prior to trial. During trial these concerns should have properly been the subject of cross examination and rebuttal evidence. The "mere second thought" of a litigant does not, however, compel Rule 60 (b) relief. *Mayberry* v. *Maroney*, 529 F. 2d 332, 337 (C.A. 3, 1976). Having examined Defen-

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can go out on the open market and replace the property by buying other property freely offered for sale." Prosser, *Cases and Materials on Tort* (Foundation Press, 1971) p. 1069. The validity of this general principle is not diminished by the uniqueness of the market or the non-salability of the object. See *Id.*, at p. 1071. Just as Defendants argue that the "lowest replacement cost" is unfound as resulting in too high an award, Plaintiffs may argue that it was too low. Arguments of this type fall under no category of relief under Rule 60(b).

dant's materials[5] we find nothing that would move us to alter our original decision.

II. *The Rule 60(a) Motion.*

Defendants sought, and were granted, leave to file a Rule 60(a) Motion, correction of clerical mistakes, and instead now seek relief more properly brought pursuant to Rule 10(e) of the Fed.R.App. P. The issue, succinctly, is the correction of the record on appeal.

Under Rule 10(e) the parties may by stipulation direct that an omission or misstatement be corrected. From Defendant's Motion and Plaintiffs' opposition we find that such is the case with respect to six of the contested items that make up the record on appeal. The following, on stipulation, shall be STRICKEN from the record.

(1) Exhibit 50 a Transcript of Trial Cr. 61-73.
(2) Exhibit 50 b Certified copy of Information and Judgment in Criminal 61-73.
(3) Exhibit 39 The Ecology of A Mangrove (Booklet)
(4) Exhibit 43 Mangroves of Arid Environments in P.R. (Booklet)
(5) Exhibits 20 a and 20 c Field Notes.
(6) The items listed in the Supplemental Index transmitted to the Court of Appeals on May 1, 1979.

All other issues regarding this Motion deal with whether or not the items in dispute were admitted into evidence. Defendants seek correction of the record by striking these items. Plaintiffs oppose by stating that they were admitted. Counsel for Defendants has filed an affidavit wherein he states that it

[5] A great deal of Defendants' documents,reports, affidavits, and other exhibits are filed as "newly discovered" evidence. Although we have examined and considered them on ruling on this Motion we have serious reservations that they qualify as that type of "evidence which by due diligence could not have been discovered in time to move for a new trial", or that with due diligence could not have been presented at trial. Cf. *Posttape Associates* v. *Eastman Kodak Company*, supra at p. 327.

was his understanding that under this Court's Order he was to meet with opposing counsel and the Courtroom Clerk and mark proposed exhibits for identification purposes only. This was not the Order of this Court. Further this is a completely and totally erroneous interpretation of the same. The parties were to mark items as to which there was no objection as Exhibits; if there was an objection to its admissibility it was to be marked as an identification. See esp.: pages 122-123 of the transcript of Trial Proceedings. This is part of the Local Rules of this Court, see Local Rule 9, and it has always been the operating policy of this Judge.

For all the above-cited reasons the Motion for Relief from judgment, Rule 60(b), is DENIED. The Motion for Correction of the Record, except as otherwise stipulated and noted in this Order, is DENIED. The Clerk of the Court is instructed to insure that the Clerk of the Court of Appeals for the First Circuit and all counsel of record are expeditiously notified.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8th day of August, 1979.

/s/ JUAN R. TORRUELLA

JUAN R. TORRUELLA

U. S. DISTRICT COURT JUDGE

APPENDIX B

THE WEST OF ENGLAND SHIP OWNERS MUTUAL PROTECTION & INDEMNITY ASSOCIATION (LUXEMBOURG)

To Members and Correspondents

The day-to-day business of The West of England (Luxembourg) is managed by The West of England (London) to whom all correspondence should be addressed. Thc Association does not appoint agents. Commercial and also legal firms are, however, appointed in the principal ports of the world in order to assist Masters and Ship's Agents when required, in relation to claims which fall within the scope of the cover afforded to its Members by the Association, as set out in the Rules.

A list of these correspondents is included in the Book of Rules, a copy of which is issued to Owners and Master of each vessel entered in the Association, and also to the said correspondents.

When assistance is required in United Kingdom ports, Masters or Ship's Agents should contact tho Association's Managers in London who will, if necessary, arrange for legal and/or technical assistance to be provided at the port concerned.

In ports where both commercial and legal firms have been appointed, the former should, in the first instance, be contacted by Masters or Ship's Agents. If the matter is one which the commercial representatives consider requires the Intervention of lawyers, they will make the nccessary arrangements with the Association's local lawyers, or with lawyers of their own choosing, if the Association has no appointed legal representative.

It is very desirable that there should be the closest liaison between the respective correspondents in a port, and although the assistance of lawyers should not be sought unnecessarily,

where the matter concerned involves (or may involve) the vessel in a substantial claim, or where the circumstances present particular difficulties, the Association's lawyers should be consulted promptly in order that a thorough investigation can be conducted while the vessel is still in port.

The general requirements of the Association from its correspondents is that they fully investigate the circumstances relating to the matter on which they have been consulted, obtaining full statements from the ship's officers and/or crew and independent witnesses (if any). Where necessary, competent surveyors should be engaged in conjunction with the ship's agents.

Advice should be given to the Master about any procedural steps which should be taken by him to protect his, or his Owners' position, in accordance with local or statutory law, e.g. Noting Protest.

Arrangements should be made to obtain authenticated abstracts from the log books relating to the matter under investigation, and in the case of claims for damage and/or loss of cargo such abstracts should cover the whole of the voyage, i.e. from the loading of the cargo to its discharge.

When investigations have been completed a full report should be made to the Association's Managers in London together with the witnesses' reports etc. The Association welcomes the views of its correspondents as to, (1) the cause of the accident or loss and (2) the legal responsibility of the ship.

In no case should liability be admitted or any payment made unless authorised by the Association.

It should be pointed out that although, generally speaking, the vessels entered in the Association are owned by the Members concerned, and claims made against them would be in their capacity as Owners, the Association also accepts entries on behalf of Time Charterers and Voyage Charterers. The vessels which are the subject of such entries do not appear in the printed list of vessels, but the Master should have in his

possession evidence of entry in the Association. Correspondents can always obtain confirmation of the Association's interest by cabling direct to the Association's London Managers.

In some cases the Association has entries for both the Owners and the Charterers of a particular vessel.

The list of vessels entered in the Association as issued to correspondents should be regarded as no more than a guide—vessels may be withdrawn from, or new vessels entered in, the Association after the list is printed. Special terms of entry apply to some members under which certain risks are excluded or subject to special deductibles.

It is therefore essential that prompt advice of claims is given to the Association's London Managers in order that the extent of its interest can be confirmed.

The attention of correspondents is drawn to Rule 19 which sets out the deductibles applying to certain types of claims, and to Rule 16 which lays down the conditions under which costs and expenses may be recovered from the Association. It will be noted that such costs, etc., are only recoverable in respect of claims for which the Association has (or could have had) liability. It follows, therefore, that costs and expenses incurred in respect of claims for which the Association could never have had any liability are not recoverable from the association. Where such claims are referred to correspondents for their attention they should point out to the Members or their agents that, as the Association's liability is not involved, their advice and assistance is provided on the understanding that their charges will be for account of the Members concerned. It may help to avoid misunderstanding to set out the rules of practice which we apply.

(1) If the ship concerned is named in our list, the Club will pay direct to the Correspondent his fee and disbursements, provided only that the service he rendered was in respect of a matter within the

terms of a full cover; but

(2) Every Correspondent is required to give the Club notice of a new case as soon as possible. If the ship concerned is named in our list but the matter for which a Correspondent has rendered a service is excluded from that ship's cover by a special term, (e.g. a special deductible), the Correspondent will be so informed in the Club's reply. And in that event the Club will send the Member a copy of the Correspondent's letter, at the same time advising him that the Club is not concerned and that the cost of handling the case will be for his account. The Correspondent, if he wishes to continue to handle the case, is recommended to write to the Member also, asking whether the Member wants him to carry on with the case. The Club will pay direct to the Correspondent his charge for services reasonably rendered until the time he received the Club's reply, provided that there was no unnecessary delay in giving the Club notice of the case. Notwithstanding this payment the Member remains responsible to reimburse the Club; and

(3) As our list of entered ships is published only once a year and it is not practicable to circulate amendments from time to time, it might well happen that a Member or Agent of a ship that is not named in our list rightly insists that she is nevertheless entered with the Club. In such cases Correspondents are recommended to telex us for instructions and render any service that cannot await our reply. Even if the ship is not entered, the Club will pay the Correspondents for any charge reasonably incurred before our reply is received.

Correspondents should submit their accounts to the Association as promptly as possible after completion of the case or

when their services are no longer required in relation to the matter concerned.

In the event of a vessel being arrested (or threatened with arrest) and bail or other security required to obtain the vessel's release, the Association may, in its sole discretion, provide such bail or security on application being made to the Association's Managers in London. *No bail or other security should be provided on behalf of the Association, without the express authority of the Association first being obtained.*

CARGO CLAIMS. It is sometimes assumed by the Charterers' Agents that because a vessel is entered in the Association by the Owner, the Association's correspondents should advise on, and/or approve payment of, cargo claims. If under the terms of the Charter Party the Owners are relieved of liability for cargo claims, and the Charterers have not covered their cargo risks with the Association, the Charterers' agents should be referred to their Principals for instructions.

As a general rule it is not necessary that minor cargo claims of a routine nature (e.g. shortages) be submitted to the Association's correspondents. Before settling such claims, however, ship's agents should be satisfied that the ship's liability is involved and the amounts claimed do not exceed the carrier's contractual or statutory limit of liability. The Association's correspondents should be consulted in all cases where the ship may be involved in a heavy cargo claim, and in dealing with such claims, correspondents should bear in mind the bill of lading conditions and exceptions and the established law relating to such claims. Where the bill of lading incorporates the terms, conditions and exceptions of the Charter Party a copy of the latter document can usually be supplied by the Master for inspection. If, however, it is not available the correspondents should advise the Association's London Managers who will obtain a copy and advise them as to liability of Owners and/or Charterers.

Correspondents should not approve claims for settlement

without first satisfying themselves that the sum claimed is not in excess of any limitation provided by the bill of lading.

Where damage to cargo occurs a surveyor should be appointed to attend aboard the ship with a view to ascertaining the cause and extent of the damage. If the Master anticipates that the cargo has suffered damage, he should radio his Owners to this effect, in order that the Association can arrange, through its correspondents, for a surveyor to attend aboard immediately on arrival of the vessel.

Surveyors representing cargo interests should not be allowed aboard unless accompanied by the ship's surveyor and the ship's agent. In this respect it should be mentioned that surveyors appointed by Lloyds Agents almost invariably represent cargo interests.

Where cargo has been damaged by water which has obtained entry to the cargo compartment through a broken pipe or valve and it is found necessary for a renewal to be made the old part should be carefully preserved so that, if required, it can be produced as evidence in the vessel's defence.

In respect of cargo carried on deck, claims for damage and/or loss of deck cargo should be rejected by reference to bill of lading clauses and conditions.

Where there is evidence that deck cargo has been lost overboard during heavy weather the Master should be advised to Note Protest, and the consignees supplied, if required, with copy of the Protest and relevant log extract to enable them to claim on their Insurers.

CUSTOMS PENALTIES. The Customs Regulations of all Countries are designed primarily to protect the State from infringements of its rights and statutes, both from inside and outside of the Country, and are of necessity very wide in their application.

It follows, therefore, that the import vessel is the object of particular attention by the Customs Authorities and all shipping documents are closely scrutinized. As a result any errors in

Manifests as to quantity or description of goods on board may result in heavy fines being imposed on the vessel. Failure to accurately manifest all dutiable goods whether owned by the ship, crew or passengers invariably involves the imposition of not only heavy fines, but also confiscation of unmanifested property, in some countries it is an offence for a vessel to enter a port when she has been "constructed, adapted, altered or fitted for the purpose of concealing goods".

It is a requirement in certain countries that ship's documents, such as Crew List, bill of Health, etc., must be visaed by their Consuls at loading ports and/or the last port of call, and failure to do this involves the vessel in a penalty on arrival at the discharging port.

Members should, therefore, impress upon their Masters and Agents the necessity of fully acquainting themselves, before or at the time of loading, with the relative Customs requirements at the port or ports of discharge, and that all documentation complies with such requirements.

In the event of a fine being imposed on the vessel, the Association's correspondents should immediately be consulted by the ship's agents, in order that they can consider whether a petition should be made to the Director of Customs for cancelation of or a reduction in the fine.

PERSONAL INJURY AND SICKNESS CLAIMS. When medical assistance is required, Masters and/or ship's agents should apply to the Association's local correspondent.

If hospital treatment is necessary the Association's correspondent will give advice as to a hospital whose charges are considered reasonable. Private Clinics should, as a general rule, be avoided.

All medical and hospital accounts (exceeding £50) must be submitted to the Association's correspondent for approval before payment, in order to avoid overcharges. Accounts approved for payment by the Association's correspondents should be endorsed as follows:

"Examined and approved for payment subject to the conditions of the vessel's entry in the West of England Steamship Owners Protection and Indemnity Association Ltd."

If an account is considered excessive and a suitable reduction cannot be obtained, such account should be endorsed to the effect that it is considered excessive and the Association advised accordingly.

All serious accidents to members of the crew, and all injuries, no matter how trivial they may appear to be, suffered by passengers, longshoremen or third parties should be reported to the Association's correspondents in order that the correspondents may, at their discretion, conduct on-board investigations into the cause and circumstances of the accident. Such statements should contain details of any witness concerned, to enable him to be contacted if this should become necessary. In the case of crew members, the man's home address and the official number of his Seaman's Book of Service should be quoted. The greatest care must be exercised to prevent any part of the ship's gear (the breakage or failure of which may have caused or contributed to the accident), from being removed from the ship by any unauthorised person. Such gear should, immediately following the accident, be taken out of use and, in the case of portable gear such as ropes, wires or blocks, be handed to the Association's correspondents at the earliest possible moment, in case it is required for examination by a Specialist to determine the cause of the failure, and/or for forwarding to the place where claim is subsequently brought. Where the broken gear is a part of the vessel's structure, or is not easily removable ashore, the Association's correspondents/lawyers investigating should arrange for the defective part to be properly surveyed and photographed. In the event that a claim arising out of the accident is intimated, the Association's London Managers should immediately be informed with the fullest possible details and should be kept closely advised regarding all developments.

When an officer or seaman is left behind, the ship's agents should be instructed to arrange for the man's repatriation on the cheapest terms available. Provision is made under the British Merchant Shipping Acts (Distressed Seamen's Regulations) for a seaman from a British vessel to be sent home as a Distressed British Seaman (D.B.S.) on a conveyance order issued by the Consul or Shipping Master. Every effort should be made to obtain this means of repatriation. Seamen from foreign vessels can often be sent home on another vessel of the same flag at victualling rates, by arrangement with the Master or Owner concerned.

Where is it necessary, for any reason, to repatriate crew members by air, excess baggage charges should, where possible, be avoided or otherwise kept to a minimum. This can be achieved by forwarding any heavy articles, not immediately and necessarily required, by sea as personal effects.

STOWAWAYS. When stowaways are discovered on board subsequent to sailing, the Master should immediately radio the ship's Agents at the next scheduled port of call: -

(1) The stowaway's port of embarkation, date of sailing from that port and place and estimated date of arrival at next port of call.

(2) Full particulars of stowaway: -
   (a) Full names.
   (b) Last known address prior to stowing away.
   (c) Date and place of birth.
   (d) Nationality claimed by stowaway.
   (e) Full names and last known address of wife, parents or next-of-kin.
   (f) Details, including description. Official number and date and place of issue of any Passport or other identification document in the stowaway's possession.

If the vessel is due to arrive at her next scheduled port of call within a few days of discovery of the stowaway, the above in-

formation should also be repeated by radio to the Association's correspondents (either direct or via the ship's agents) at that port, thereby enabling our correspondents to advise their local Immigration Authorities of the man's impending arrival, and to make any necessary arrangements for his custody on board, or ashore, whilst the vessel is in port.

In the event that the stowaway possesses a valid passport or other identification documents, the Association's correspondents should make immediate application to the local Consulate of the country of which the man is, or claims to be, a National, in order to obtain official permission for his re-entry to that country. Where such permission is obtained, the authority of the local Immigration Officials should be sought for the stowaway to be landed from the ship with a view to his deportation, at the first available opportunity, to the country which has authorised his re-entry.

Since, in many instances, a stowaway does not possess any valid identification or travel documents, and the possibility of landing and effecting his deportation from the vessel's first port of call is therefore remote. Owners or their Agents on receipt of the Master's radio advice should pass on to the Association in London the full details received from the Master, together with information concerning the vessel's future movements, i.e. future ports of call and estimated dates of arrival in those ports, so that the Association may, through its correspondents in the country of which the stowaway claims to be a national, endeavour to obtain verification of his claim and official permission and documents enabling him to return to that country. Such documents and authority will, when obtained, be forwarded in advance of the vessel's arrival with the stowaway on board, to our correspondents at a subsequent port of call, with instructions relative to the landing and repatriation of the man from their port.

DESERTERS. In countries where the act of desertion by members of the crew constitutes a breach of the local immigration Laws or Regulations which is punishable by a fine upon the ship, the Master, if he has reason to suspect that any member of his crew intends to desert, should notify the Association's local correspondents prior to or immediately on arrival in port, thereby enabling the latter to make such arrangements as may be required to prevent the man's desertion. In the U.S.A. the boarding Immigration Official may, without giving reason for so doing, order any member(s) of the crew to be detained on board throughout the vessel's stay in a U.S. port. On service of a "Notice to detain" upon the ship, the Master should inform the Association's local correspondents who will arrange for the employment of suitable shore guards to prevent the detainee(s) from leaving the ship. Under no circumstances should a crew member be permitted to set foot ashore until he has been cleared by the local Immigration Authorities and been granted a landing permit. In the event that, despite all precautions, a man does desert, the fact should be reported immediately by the Master to the Association's correspondents and/or the ship's agents so that Immigration Authorities may be notified—the earlier the Authorities know of the desertion the greater are the chances of the deserter being apprehended.

When a fine in respect of a deserter is levied upon a ship, our correspondents should be notified when they will, in conjunction with our local lawyers, take all possible steps to obtain remission or mitigation of the fine imposed.

On a deserter being apprehended after the vessel has sailed, the Association's correspondents will assist the ship's agents in deporting the deserter at the minimum possible cost to the shipowner.

THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION (LONDON) LIMITED

CLASS II—FREIGHT, DEMURRAGE & DEFENCE. The scope of this Class is much wider than might be supposed from the three items that are traditionally used to describe it. It may be assumed that the Association is interested in almost any matter affecting a ship entered in this Class, other than matters which are the concern of the P. & I. Association.

Members of the Class are covered by the Association only for the costs and expenses incurred in prosecuting or defending a matter that comes within it, and it is particularly important, therefore, that correspondents should send the Association reports regularly so that the Member may be kept informed of the progress of the matter.

Whenever a Master of ship's agent applies to a correspondent for advice or assistance the correspondent should ascertain whether the ship concerned is entered in this particular Class by reference to the list of entered vessels. If there is any doubt as to whether or not the vessel is entered, the correspondent should write or cable to the Association, depending on the urgency of the matter.

It is also important that the correspondent should send a report to the Association on any matter which he receives direct from the Shipowner, Master or ship's agent, so that the Association may be advised of the matter as soon as possible and assume conduct of it. Before any action is taken involving expense, correspondents should immediately communicate with the Association so that its interests in the matter may be confirmed and its approval of the proposed procedure given.

June 1971

APPENDIX C

LIST OF CORRESPONDENTS

Whilst the Association does not appoint agents, the following are the names of experts and Lawyers usually engaged to advise on claims in which the Association is concerned. Captains and agents should consult them in case of emergency and difficulty connected with matters covered by the Rules of this Association, when there is not time to apply to their owners for instruction.

In ports where the Association is not specially represented the Captain or his agents should communicate with the Association or telegraph ("WESTENG" London) for instructions in connection with any serious claim covered by the Rules.

Telegraphic Addresses shown thus: (Westeng).
Asterisk denotes Lawyers.

Abadan
Gray, Mackenzie & Co. Ltd. Telephone 2488 (Gray)

Abidjan
Societe Navale Chargeurs Delmas-Vieljieux. 17, Av. Louis Barthe, P.O.B. 1281
Telephone 22-88-41 Telex 617 (Samled)

Acapulco
Agencias Maritimas del Pacifico, S.A., Presidente Miguel Aleman s/n., Muelle Fiscal, Acapulco, Gro.
Telephone 2-19-56 (Ammsa Acapulco)

Adelaide
*Finlayson & Co., Epworth Bldg., 33, Pirie St.
Telephone 86901 Telex AA 82779 (Galicia)

Aden
Luke, Thomas & Co. (Aden Shipping) Ltd., Steamer Point
Telephone 4861-4 (Thomas)

Agadir
Societe Marocaine de Protection Maritime, c/o., Mr. Canal, Bungalow Marhaba, Av.
Mohamed V. Telephone 31-52 Telex Somaf 21048 (Tranpeschaud)

Alexandria
*Abdel Hadi & Yansouni, 32, Bd. Saad Zaghioul, P.O. Box 152, ALEXANDRIA
Telephone 21351 (Aicoss Alexandria)

Algiers & District

Almeria

Witty S.A., Plaza Medinaceli 5, BARCELONA
Telephone 222-07-70 Telex 54707
(Witty Barcelona)

Amsterdam

Phs. Van Ommeren (Amsterdam) NV., 120 De Ruijterkade, P.O.B. 1457
Telephone 6-22-88 (Esomins)

Van Der Faltz & Voute, Herengracht 499
Telephone 24-01-94 Telex 14291
(Addis)

Post & Co. N.V., P.O.B. 443, 93, Westersingel, ROTTERDAM
Telephone 36-20-33 (After hours (01804) 52-81) Telex 11277
(Jacspost Rotterdam)

Ancona

Humbert Kane, 2 Piazza S. Maria, P.O.B. 157
Telephone 24352 Telex 56069 Agebrok
(Kane)

Annaba

Raymond Barthelemy, 5, Rue de Flandre Annaba
Telephone 35-21 Telex 93040
(Expermari)

Antigua & Montserrat

*Sir Fred Phillips, C.V.O., LL.B., c/o, C.O.R. Phillips, O.C., Phillips & Phillips, St. Mary Street, St. John's, Antigua

Antofagasta

The Pacific Steam Navigation Company, Casilla 990
Telephone 21032 (Pacific Antofagasta)

Antwerp

M.F. Caethoven & Co. P.V.B.A., 37, Frankrijklei
Telephone 33-59-63 Telex 32370
(Caethoven)

Apapa

*Gerald Impey, Barclays Bank Chambers, 40, Marina, P.O. Box 2879, Lagos, Nigeria
Telephone 26159 (Impey Lagos)

Aqaba

Abou Zeid & Nazzal, P.O.B. 194 AMMAN
Telephone 24104 (Nakel Amman)

Arica

Hansen y Cia. Ltda., Casilla 115 Telephone 31188 (Band Arica)

Ashdod

M. Dizengoff & Co. Ltd., (P & I section) P.O. Box 255.

Athens

*Deucalion Rediadis & Sons, 18/20, Anatasiou Tsoha Street, Athens 602
Telephone 662-719 (Derediadis Piraeus)

Commercial Representative

P.P.D. Holman, see Piraeus Telephone 676054

Auckland

*Hesketh & Richmond, 6th Floor, Norwich Union Bldg., Cnr. Queen & Durham Sts.

Telephone 20-389 (Herisco)

Augusta

Ditta Carlo A. Ali, Via Dusmet 131, Catania, Sicily. P.O.B. 209

Telephone 214-922 (Exposhíp) or (Ali)

S. Tagliavia & Cia., c/o Frateli Bonanno, Via Garibaldi 3/5

Telephone 74319 (Tagilaviaco Augusta)

San Francisco

*McCutchen, Doyle, Brown, Trautman & Enersen, 601, California Street, San Francisco 8

Telephone (415) 981-3400 (Macpag)

*Lillick, McHose, Wheat, Adams & Charles, (Claims Dept.), 500, Sansome St.

Telephone (415) 981-8666 (Pandiclub)

San Juan (Puerto Rico)

*Hartzell, Ydrach, Mellado, Santiago, Perez & Novas, 1530 Banco Popular Center Hato Rey, San Juan, P.R. 00918

Telephone (809) 765-6075 Telex CW-WUI 3654204 (Hartzell)

Santa Marta

W. Moller & Cia, Ltda., c/o Ricardo Fuentes Almaceny Fuentes, Apartado Aereo 524

Telepnone 2067 (Mollercol)

Santos

L. Figueriedo S.A., Rua Visconde do Rio, Branco 2, Caixa Postale 813

Telephone 2-7135 Telex 22841 (Doralice Santos)

Savannah, Ga.

*Lawton, Sipple & Chamlee, 26, East Bryan Street, P.O. Box 9523, Georgia 31402

Telephone (912) 232-3165 (Lawton)

*Connerat, Dunn, Hunter, Houlihan, Maclean, & Exley, Savannah Bank & Trust Bldg., P.O. Box 9848

Telephone (912) 233-6685 (Ancan)

Savona

Alfredo Saidelli, Via Santorre di Santarosa 2-5

Telex 27531 Saidelli (Saidelli)

*Studio Mordiglia, 14-17, Via XX Settembre, GENOA

Telephone 581-848 (Name Genoa)

Sete

L. Thos. & Geo. Budd, P.O. Box 842 Colbert, 8, Rue Beauvau, 13 Marseilles (1 er)

Telephone 33.71.36 (Budd Marseilles)

Seattle

Howard, Le Gros, Buchanan & Paul, 2910 Seattle First National Bank Building,
1001 Fourth Ave., SEATTLE

Telephone Main 3-4990 (Hufhay Seattle)

Seoul
Hyopsung Shipping Corp., P.O. Box 236, Kwang Hwa Moon, Seoul
Telephone 22-2442 (Hyopsung Seoul)

Seville
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Sharjah
Gray, Mackenzie & Co. Ltd. (Gray)

Shimizu
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Skikda
M. Andre Raynal, c/o Societe Algerienne de Navigation, Charles Schiaffina & Co.,
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St. Vincent (Cape Verde Isles.)

Millers & Corys, Cape Verde Islands, Ltd. St. Vincent

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APPENDIX D

48 U.S.C.A. § 746. Public lands and buildings; reservations; rights prior to July 1, 1902.

All public lands and buildings, not including harbor areas and navigable streams and bodies of water and the submerged lands underlying the same, owned by the United States in the island of Puerto Rico and not reserved by the President of the United States prior to July 1, 1903, pursuant to authority vested in him by law, are granted to the government of Puerto Rico, to be held or disposed of for the use and benefit of the people of said island. Said grant is upon the express condition that the government of Puerto Rico, by proper authority, release to the United States any interest or claim it may have in or upon the lands or buildings reserved by the President as mentioned herein. Nothing herein contained shall be so construed as to affect any legal or equitable rights acquired by the government of Puerto Rico or by any other party, under any contract, lease, or license made by the United States authorities prior to the 1st day of May 1900, July 1, 1902, c. 1383, § 1, 32 Stat. 731; May 17, 1932, c. 190, 47 Stat. 158.

48 U.S.C.A. § 747. Public property transferred

All property which may have been acquired in Puerto Rico by the United States under the cession of Spain in the treaty of peace entered into on the 10th day of December, 1898, in any public bridges, road houses, water powers, highways, unnavigable streams and the beds thereof, subterranean waters, mines or minerals under the surface of private lands, all property which at the time of the cession belonged, under the laws of Spain then in force, to the various harbor works boards of Puerto Rico, all the harbor shores, docks, slips, reclaimed lands, and all public lands and buildings not reserved by the United States for public purposes prior to March 2, 1917, is placed under the control of the government of Puerto Rico, to

be administered for the benefit of the people of Puerto Rico; and the Legislature of Puerto Rico shall have authority, subject to the limitations imposed upon all its acts, to legislate with respect to all such matters as it may deem advisable. Mar. 2, 1917, c. 145, § 7, 39 Stat. 954; May 17, 1932, c. 190, 47 Stat. 158.

48 U.S.C.A. § 749. Harbors and navigable waters transferred

The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in sections 747 and 748 of this title. All laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as the same may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters. Nothing in this chapter contained shall be construed so as to affect or impair in any manner the terms or conditions of any authorizations, permits, or other powers lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of the Army or other authorized officer or agent of the United States prior to March 2, 1917. Mar. 2, 1917. c. 145, § 8, 39 Stat. 954; May 17, 1932, c. 190, 47 Stat. 158; July 25, 1947, c. 343, Title II, § 205(a), 61 Stat. 501.

12 L.P.R.A. § 43. Ownership of fish

All species of fish, mollusks, crustaceans, aquatic mammals, aquatic plants and all other species comprising the marine,

lacustrine and fluvial fauna and flora, are hereby declared to be the property of the Commonwealth of Puerto Rico and of common ownership and public use. They may be freely fished, caught, utilized, or traded, subject to the limtations of sections 41-63 of this title and of the regulations for their enforcement. May 13, 1936, No. 83, p. 438, § 3 July 1, 1953, No. 118, p. 458, § II, eff. July 1, 1953.

12 L.P.R.A. § 44. Jurisdictional waters

For the purpose of sections 41—63 of this title, the limit of the jurisdictional waters of the Commonwealth of Puerto Rico shall be three (3) miles from the shoreline of Puerto Rico and the islands politically belonging thereto.—May 13, 1936, No. 83, p. 438, § 4; July 1, 1953, No. 118, p. 453, § III, eff. July 1, 1953.

31 L.P.R.A. § 1023. Common things defined

Common things are those the ownership of which belongs to no one in particular and which all men may freely use in conformity with their innate nature, such as air, rain water, the sea and its shores.—Civil Code, 1930, § 254.

CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO

Art. VI §19. [Natural resources; historic or artistic sites; penal institutions; delinquents]

It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community; to conserve and maintain buildings and places declared by the Legislative Assembly to be of historic or artistic value; to regulate its penal institutions in a manner that effectively achieves their purposes and to provide, within the limits of available resources, for adequate treatment of delinquents in order to make possible their moral and social rehabilitation.

APPENDIX E

Clean Water Act, 33 U.S.C. 1321(f) (5)

"(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government."

OCS Lands Act, 43 U.S.C. 1813(b)(3):

"...(3) under paragraph (2)(C), by the President, as trustees for natural resources over which the Federal Government has sovereign rights or exercises exclusive management authority, or by any State for natural resources within the boundary of the State belonging to, managed by, controlled by, or appertaining to the State, and sums recovered under paragraph (2)(C) shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources;..."

Florida (F.S.A. Sec. 376.11(5)(c) (1974):

"376.11 Florida Coastal protection trust fund

(1) The purpose of this section is to provide a mechanism to have financial resources immediately available for cleanup and rehabilitation after a pollutant has been discharged, to prevent further damage by the pollutant, and to pay for damages. It is the legislative intent that this section be liberally construed to effect the purposes set forth, such interpretation being especially imperative in light of the danger to the environment and resources..."

"(5) Moneys in the Florida coastal protection fund shall be disbursed for the following purposes and no others:

(a) Administrative expenses, personnel expenses, and equipment costs of the department related to the enforcement of this chapter subject to § 376.18.

(b) All immediate costs involved in the abatement of pollution related to the discharge of pollutants covered by this chapter and the abatement of other potential pollution hazards as authorized herein.

(c) All costs and expenses of the cleanup and rehabilitation of water fowl, wildlife, and all other natural resources damaged by the discharge of pollutants, whether performed or authorized by the department or any other state or local agency.

(d) All provable costs and damages which are the proximate results of the discharge of pollutants covered by this chapter.

(6) The department shall recover to the use of the fund from the person or persons causing the discharge or from the federal government, jointly and severally, all sums owed or expended therefrom, pursuant to section 376.12(4), except that recoveries resulting from damage due to a discharge of a pollutant or other similar disaster shall be approtioned between the Florida coastal protection trust fund and the general revenue fund so as to repay the full costs to the general revenue fund of any sums disbursed therefrom as a result of such disaster. Requests for reimbursement to the fund for the above costs, if not paid within thirty days of demand, shall be turned over to the department of legal affairs for collection.
Amended by Laws 1974, c. 74-336, § 11, eff. July 1, 1974."

Maryland (A.C.Md. Natural Resources Sec. 8-1411(f) (1974):

"*(f) Maryland Oil Disaster Containment, Clean-up and Contingency Fund—Established; purpose; reimbursement by polluters; credits; debits.*—There is a Maryland Oil Disaster

Containment, Clean-up and Contingency Fund for the Department to use to develop equipment, personnel, and plans; for contingency actions to respond to, contain, clean-up, and remove from the land and waters of the State discharges of oil, petroleum products, and their by-products into, upon, or adjacent to the waters of the State; and restore natural resources damaged by discharges. The cost of containment, clean-up, removal, and restoration shall be reimbursed to the State by the person responsible for the discharge. The reimbursement shall be credited to the Fund. The Fund shall be limited to the sum of $1,000,000. To this sum shall be credited every license fee, fine, if imposed by the circuit court for any county or the Criminal Court of Baltimore, as the case may be, and any other charge related to this subtitle. To this Fund shall be charged every expense the Department has which relates to this section.
(1975, ch. 851; 1976, ch. 436; 1977, ch. 784, § 5.)"

Massachusetts (M.G.L.A. c.21 Sec. 27(14) (1973):

"**§ 27. Powers and duties of division**

It shall be the duty and responsibility of the division to enhance the quality and value of water resources and to establish a program for prevention, control, and abatement of water pollution. Said division shall:..."

"(14) Undertake immediately whenever there is spillage, seepage or other discharge of oil or hazardous material into or proximate to any of the waters of the commonwealth or into any offshore waters which may result in damage to the waters, shores or natural resources utilized or enjoyed by citizens of the commonwealth to cause said spillage, seepage or discharge to be contained and removed by whatever method it considers best. Chemicals shall not be used in the cleanup operation of oil or hazardous material spills unless their use has been authorized by the division, and if a public water supply or

shellfish beds may be affected, by the department of public health. In this clause, the word "oil" shall mean insoluble or partially soluble oils of any kind or origin or in any form including, but not limited to, crude or fuel oils, lube oil or sludge, asphalt, insoluble or partially insoluble derivatives of mineral, animal or vegetable oils.

The division shall determine the person responsible for causing such spillage, seepage or discharge and the names of all persons who owned or controlled the oil or hazardous material or who owned or controlled or leased the vessel, tank, pipe, hose or other container in which the oil or hazardous material was located when the spillage, seepage or discharge occurred. Said persons shall be jointly and severally liable to the commonwealth for all costs and expenses incurred by the division in making such investigation, and in containing and removing the oil or hazardous material, and shall be jointly and severally liable to the commmonwealth for all damages done to natural and recreational resources, including all costs of restoring damaged areas to their original condition, and to any other person for any damages to his real and personal property. The person responsible for causing such spillage, seepage or discharge shall be punished by a fine of not more than ten thousand dollars for each day such spillage, seepage or discharge continues, or by imprisonment for not more than two years or both.

Upon request of the director, the attorney general shall bring an action to recover all costs and expenses incurred for such investigation, containment, removal, and restoration.

Such costs and expenses shall be recovered in an action of tort, and shall be credited to the account from which said sums of money had been advanced and may, subject to appropriation, be expended by the division for the purposes set forth in this clause. In any such action the commonwealth may also seek recovery for all loss and damage to the natural and recreational resources of the commonwealth.

Any owner or operator of a vessel, vehicle, railroad car or facility used for the production processing, transportation, transfer or storage of oil or hazardous material shall, as soon as he has knowledge of any such spillage, seepage or discharge of oil or hazardous material into or proximate to waters of the commonwealth, promptly notify the director of the division or his representative of such discharge. Any person who fails so to notify the director or his representative of such discharge shall be punished by a fine of not more than five thousand dollars.

Any person who removes oil as defined in this clause, or hazardous material, as defined in section twenty-six A, from the waters of the commonwealth or adjoining shorelines shall be entitled to reimbursement from any other person for the reasonable costs expended for such removal, if such oil or hazardous material resulted from the negligence of two or more persons, each shall be liable to the others for his pro rata share of the cost or removal.

Any person who gratuitously renders assistance at the request of a duly authorized officer in removing oil or hazardous material from the waters of the commonwealth or adjoining shorelines shall not be held liable, notwithstanding any other provision of law, for civil damages as a result of any act of omission by him in removing such oil or hazardous material, except acts or omissions amounting to gross negligence or willful or wanton misconduct.

Amended by St.1973, c. 546, § 3; St. 1979; c. 705, § 2."

Mississippi (M.A.C. Sec. 49-27-55 (1979 Supp.)):

"§ 49-27-55. Civil liability of violators — restoration — punitive damages — mandatory injunction — jurisdiction of circuit or county court — remedies preserved.

(a) Any person who violates the provisions of this chapter shall be liable to the State of Mississippi for the restoration of all affected coastal wetlands to their condition prior to such

violation, insofar as such restoration is possible, and for any and all damages to the wetlands. The appropriate chancery court by writ of mandatory injunction shall allow a reasonable time for completion of the restoration and may, in its discretion, order as punitive damages a sum not to exceed fine hundred dollars ($500.00) per day for each day such violation has existed. The said chancery court may further order as punitive damages a sum not to exceed five hundred dollars ($500.00) per day for each day that the violation exists beyond the date set by said court in its unjunction for the restoration of said wetland. If injunctive relief is not sought, the appropriate circuit or county court shall have jurisdiction over any action for damages and/or punitive damages as set forth in this paragraph.

(b) Nothing in this chapter shall preclude other statutory or common law remedies by public or private parties against violators or nonviolators of this chapter.

SOURCES: Laws, 1973, ch. 385, § 8(d)(e), eff from and after July 1, 1973."

New Jersey (N.J.S.A. 58:10-23.11g(a)(2) 1979 Supp.)):

58:10-23.11g Liabilities for cleanup and removal costs and direct and indirect damages

a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:

(1) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(3) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds 10% or the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

New York (N.Y. Nar.L. 181(2)(b) (1979 Supp.)):

§ 181. Liability

1. Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section.

2. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, including, but not limited to:

(a) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, repaired, or replaced, any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(b) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(c) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds ten percent of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities

related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim if filed;

(d) Loss of tax revenue by the state or local governments for a period of one year due to damage to real or personal property proximately resulting from a discharge;

(e) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this article.

North Carolina (N.C.G.S. Sec. 143-215.90 (1979 Supp.)):

§143-215.90. Liability for damage to public resources.

(a) Any person who discharges oil or other hazardous substances in violation of this Article or violates any order, rule or regulation of the Environmental Management Commission adopted pursuant to this Article, or fails to perform any duty imposed by this Article, or violates an order or other determination of the Environmental Management Commission made pursuant to the provisions of this Article, including the provisions of a discharge permit issued pursuant to G.S. 143-215.1, and in the course thereof causes the death of, or injury to fish, animals, vegetation or other resources of the State or otherwise causes a reduction in the quality of the Waters of the State below the Standards set by the Environmental Management Commission, shall be liable to pay the State damages. Such damages shall be an amount equal to the cost of all reasonable and necessary investigations made or caused to be made by the Environmental Management Commission in connection with such violation and the sum of money necessary to restock such waters, replenish such resources, or otherwise restore the rivers, streams, bays, tidal flats, beaches, estuaries or coastal waters and public lands adjoining the seacoast to their condition prior to the injury as such condition is determined by the Environmental Management Commis-

sion in conference with the Wildlife Resources Commission, and any other State agencies having an interest affected by such violation (or by the designees of any such boards, commissions, and agencies).

(b) Upon receipt of the estimate of damages caused, the Department shall give written notice by registered or certified mail to the person responsible for the death, killing, or injury to fish, animals, vegetation, or other resources of the State, or any reduction in quality of the waters of the State, describing the damages and their causes with reasonable specificity, and shall request payment from such person. Damages shall become due and payable upon receipt of such notice. Upon written application to the Department within 30 days of receipt of notice, the person assessed damages may request an administrative hearing pursuant to G.S. 143-215.4. On such hearing, the estimate of the replacement cost of fish or animals or vegetation destroyed, and the estimate of costs of replacing or restoring other resources of the State, and the estimate of the cost of restoring the quality of waters of the State shall be *prima facie* evidence of the actual replacement cost of fish, animals, vegetation or other resources of the State, and of the actual cost of restoring the quality of the waters of the State; provided, that such evidence is rebuttable. In arriving at such estimate, any reasonably accurate method may be used and it shall not be necessary for any agent of the Department of Wildlife Resources Commission to collect, handle, or weigh numerous specimens of dead or injured fish, animals, vegetation or other resources of the State, or to calculate the costs of restoring the quality of the waters using any technology other than that which is existing and practicable, as found to be such by the Secretary. Provided, that the Department may effect such mitigation of the amount of damages as the commission may deem proper and reasonable. Appeal from final determination of the commission or its agents pursuant to such a hearing shall be pursuant to G.S. 143-215.5. If the damages

are not paid to the Department within 30 days of receipt of notice, or if the amount of damages provided in an order issued subsequent to an application to the Department is not paid within 30 days of the issuance thereof, the Attorney General, upon request of the Department, shall bring an action to recover such damages in the name of the State, in the Superior Court of Wake County, or in his discretion, in the superior court of any other county in which the damages occurred. Upon such action being brought, the scope of the court's review shall be as provided in G.S. 150A-51. Any money recovered by the Attorney General or by payment of damages by the person charged therewith by the Department shall be transferred by the Environmental Management Commission to appropriate funds administered by the State agencies affected by the violation for use in such activities as food fish or shellfish management programs, wildlife and waterfowl management programs, water quality improvement programs and such other uses as may best mitigate the damage incurred as a result of the violation. No action shall be authorized under the provisions of this section against any person operating in compliance with the conditions of a waste discharge permit issued pursuant to G.S. 143-215.1 and the provisions of this Part.

(c) For the purpose of carrying out its duties under this Article, the Environmental Management Commission shall have the power to direct the investigation of any death, killing, or injury to fish, animals, vegetation or other resources of the State, or any reduction in quality of the waters of the State, which in the opinion of the Environmental Management Commission is of sufficient magnitude to justify investigation. (1973, c. 534, s. 1; c. 1262, s. 23; 1979, c. 535, s. 24.)

Oklahoma (82 O.S.A. Sec. 937(b) (1971)):

§ 937. Penalties-Injunctions

(a) Any person who knowingly or willfully violates any properly promulgated order of the Pollution Control Coor-

dinating Board shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than Five Hundred Dollars ($500.00) per day for each of the first ten (10) days of continuous violation and One Thousand Dollars ($1,000.00) for each day thereafter, or by imprisonment for a term of not more than ninety (90) days or by both such fine and imprisonment. Each and every day the violation occurs shall constitute a separate violation.

(b) Any person, firm or corporation who violates any of the provisions of, or fails to perform any duty imposed by this act or regulation issued hereunder, or who violates any order or determination of the Board promulgated pursuant to this act, which violation causes the death of fish or other wildlife shall, in addition to the penalties provided in subsection (a), be liable to pay to the state an amount equal to the sum of money reasonably necessary to restock such waters which shall include replacement cost of fish killed based on the most recent fish values as officially published by the American Fishery Society, Southern Division, and all other costs required for such restocking including but not limited to shipment and handling, or replenish such wildlife and all cost incurred in investigating, locating or establishing the responsible person, firm or corporation as determined by the Oklahoma Wildlife Conservation Commission and approved by the Board. Such amount may be recovered by the Board on behalf of the state in a civil action brought in the district court and shall be divided among the agencies in accordance with the expenses incurred, as determined by the Board.

(c) It shall be the duty of the Attorney General on the request of the Board to bring an action for an injunction against any person, firm or corporation violating the provisions of this act, or violating any order or determination of the Board. In any action for an injunction brought pursuant to this section, any finding of the Board after hearing on due notice shall be prima facie evidence of the fact or facts found therein.

(d) Upon showing by the Attorney General in behalf of the Board that such person is violating or is about to violate the provisions of this act or is violating or is about to violate any order or determination of the Board, an injunction shall be granted without the necessity of showing a lack of adequate remedy at law.
Amended by Laws 1971, c. 338, § 10, operative July 1, 1971; Laws 1976, c. 21, § 1.

Oregon (O.R.S. Sec. 468.745 (977)):

468.745 Liability for damage to fish or wildlife or habitat; agency to which damages payable.

(1) Where the injury, death, contamination or destruction of fish or other wildlife or injury or destruction of fish or wildlife habitat results from pollution or from any violation of the conditions set forth in any permit or of the orders or rules of the commission, the person responsible for the injury, death, contamination or destruction shall be strictly liable to the state for the value of the fish or wildlife so injured or destroyed and for all costs of restoring fish and wildlife production in the affected areas, including habitat restoration.

(2) In addition to the penalties provided for by law, the state may seek recovery of such damages in any court of competent jurisdiction in this state if the person responsible under subsection (1) of this section fails or refuses to pay for the value of the fish or wildlife so destroyed and for all costs of restoring fish and wildlife production in the affected areas, including habitat restoration, within a period of 60 days from the date of mailing by registered or certified mail of written demand therefor.

(3) Any action or suit for the recovery of damages described in subsection (1) of this section shall be brought in the name of the State of Oregon upon relation of the Department of Environmental Quality or State Department of Fish and Wildlife or the Attorney General. Amounts recovered under this sec-

tion shall be paid to the state agency having jurisdiction over the fish or wildlife or fish or wildlife production for which damages were recovered. [Formerly 449,109, 1979 c. 534 § 1]

Virginia (Va. Code Sec. 62.1-44.15(11) (a)):

§62.1-44.15. Powers and duties.

It shall be the duty of the Board and it shall have the authority:...

(11) To investigate any large-scale killing of fish.

(a) Whenever the Board shall determine that any owner, whether or not he shall have been issued a certificate for discharge of waste, has discharged sewage, industrial waste, or other waste into State waters in such quantity, concentration or manner that fish are killed as a result thereof it may effect such settlement with the owner as will cover the costs incurred by the Board and by the Commission of Game and Inland Fisheries in investigating such killing of fish, plus the replacement value of the fish destroyed, or as it deems proper, and if no such settlement is reached within a reasonable time the Board shall authorize its executive secretary to bring a civil action in the name of the Board to recover from the owner such costs and value, plus any court or other legal costs incurred in connection with such action.

Washington (R.C.W. Sec. 90.48.142 (1977)):

90.48.142 Violations-Liability in damages for injury or death of fish, animals, vegetation-Action to recover

Any person who violates any of the provisions of this chapter, or fails to perform any duty imposed by this chapter, or violates an order or other determination of the commission or the director made pursuant to the provisions of this chapter, including the conditions of a waste discharge permit issued pursuant to RCW 90.48.160, and in the course thereof causes the death of, or injury to, fish, animals, vegetation or other resources of the state, or otherwise causes a reduction, in the

quality of the state's waters below the standards set by the commission, thereby damaging the same, shall be liable to pay the state damages in an amount equal to the sum of money necessary to restock such waters, replenish such resources, and otherwise restore the stream, lake or other water source to its condition prior to the injury, as such condition is determined by the commission. Such damages shall be recoverable in action brought by the attorney general on behalf of the people of the state of Washington in the superior court of the county in which such damages occurred; *Provided*, that if damages occurred in more than one county the attorney general may bring action in any of the counties where the damages occurred. Any money so recovered by the attorney general shall be transferred to either the state game fund or the department of fisheries to use for food fish or shellfish management purposes and propagation, or to any other agency of the state having jurisdiction over the resource damaged and for which said moneys were recovered, as appropriate: *Provided*, that the agency receiving such money, shall utilize not less than one-half of said money on activities or projects within the county where the action was brought by the attorney general. No action shall be authorized under this section against any person operating in compliance with the conditions of a waste discharge permit issued pursuant to RCW 90.48.160 [Added by Laws 1st Ex Sess 1967 ch. 139 § 13; Amended by Laws 1st Ex Sess 1970 ch. 88 § 12, effective February 23, 1970.]